IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAY TERM, 1910

CHAS. H. LILLY CO.,
Plaintiff in Error,
vs.
CHAS. S. BRENT & BRO.,
Defendant in Error.

No. 1825

UPON WRIT OF ERROR TO THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

Brief of Plaintiff in Error

JOHN H. ALLEN,
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STATEMENT OF THE CASE.

This cause comes to this court under a writ of error, directed to the Circuit Court of the Western District of Washington, Northern Division, from a directed verdict in favor of the defendant in error after a trial before a jury.

The following are the facts pertinent to the issues involved:

On or about the 22nd day of June, 1908, The Chas. H. Lilly Co. received a letter from the defendant in error of which the following is a copy. (page 209):

Paris, Ky., June 17, 1908.

"Messrs. Chas. H. Lilly & Co.,

"Seattle, Wash.

"Dear Sirs:

"We offer you, for wire acceptance and if unsold 325 bags of Fancy Cleaned TRUE KENTUCKY BLUE GRASS SEED at $1.40 per bu., f.o.b. cars here. August, Sept, or October shipment.

"Samples of the new crop will not be ready before the first of August, but we will guarantee to deliver only new crop and that it will test 21 pounds to the measured bushel.

"Hoping to be favored with your order, we are

"Yours truly,

"Chas. S. Brent & Bro."

The plaintiff in error telegraphed the following acceptance. (Record, p. 210):

"Seattle, Wn., June 22.

"Chas. S. Brent & Bro.

"Book order one minimum car Kentucky Blue grass, yours 17th.

"The Chas. H. Lilly Co."

On the same day the plaintiff in error mailed to the defendant in error the following requisition: (Record, p. 210).

"THE CHAS. H. LILLY CO.

"Established 1885

"Send bill in duplicate to Seattle.

"No. 7272. Five requisition number.

"PURCHASE CONTRACT"

"Seattle, June 22, 1908.

"Chas. S. Brent & Bro., Paris, Kentucky:

"Ship to The Chas. H. Lilly Co., Seattle, Wash.

"Ship when Aug-Sept. Oct., 1908, our option.
"No drayage allowed on this order.
"The following articles:
One minimum car New Crop Fancy Cleaned True Kentucky Blue Grass Seed weighing 21 lbs. to the bushel @$1.40 per bushel.
"F. O. B. cars Paris, Ky.
"Per your quotation June 17th
Confirming our wire to you this date as follows: "Book order one minimum car Kentucky Blue Grass Yours seventeenth."

In answer to this requisition the defendant in error wrote as follows: (p. 212).

"Paris, Kentucky, June 27, 1908.
"Yours of the 22nd confirming purchase of blue grass seed from us duly to hand and seems to be correct. 325 bags fancy cleaned true blue grass seed, testing 21 lbs. to the measured bushel at $1.40 per bu. (14 #) f.o.b cars here. While the shipment is optional with us as to August, September, or October, yet we would like for you to express your preference, so that there will be no delay in making the shipment when you want it. You understand that we are generally very much rushed during these months and would not like to sell to others up to capacity of August and then learn that you wanted your car shipped that month.
"Awaiting your further favors,"

Other correspondence passed between the plaintiff and the defendant concerning the manner of shipment and quality of seeds; the plaintiff insisting upon finest quality, and asking for sample, which was sent. (Exhibits 2 and 4, pages 224-225) etc. On the 22nd

day of August, 1908, the defendant in error shipped from Paris, Kentucky, 30240 pounds of such seed and sent a draft through the bank for $3,024.00 with bill of lading attached. Immediately upon receipt of this draft the plaintiff in error telegraphed the defendant in error as follows: (Exhibit 3, p. 224).

"Cannot accept the car. Invoice should be about $2000.00 instead of $3000.00."

The plaintiff in error then wrote refusing to take up the draft, thinking that more seeds had been shipped than ordered. (Exhibit L, p. 215). The answering letter from the defendant in error, however, showed that only 30,240 pounds had been shipped, and that the draft was drawn on a basis of 14 pounds constituting a bushel; whereas the plaintiff in error was figuring on 21 pounds constituting a bushel. The plaintiff in error refused to accept the shipment, and so notified the defendant in error. The defendant in error refused to take the seeds back. It seems that the seed arrived and the car load was switched in to the plaintiff in error's warehouse by the railroad, which ran a spur thereto, and the seeds were unloaded by some of the employees of the plaintiff in error without the knowledge of the officers of the corporation and without the bill of lading or authority so to do. (See decision of court denying new trial and Record, p. 235).

The defendant in error brought suit against the plaintiff in error alleging in his complaint that under the customs of seed merchants in the United States, existing during the year 1908 and long prior thereto and ever since, the weight of a bushel of Kentucky blue grass seed was and is fixed at 14 pounds for the purpose of ascertaining and determining the price or value of any quantity of seed sold. (Record, p. 3).

The plaintiff in error answered denying the allegations of custom and sets up affirmatively the written contract contained in the offer and the telegram of acceptance and the requisition of that date confirming the telegram. (p. 8).

The cause was tried to the court and jury, and at the trial the defendant in error offered in evidence some 10 or 12 depositions of seed merchants through the United States concerning the custom as alleged in their complaint. This evidence of custom was admitted over the objection of the plaintiff in error. From these depositions it seems that the custom is universal east of the Mississippi. As to the custom west of the Mississippi, there seems to be a difference of opinion. (See decision denying new trial, p. 233). The plaintiff in error offered evidence showing that the custom did not prevail in the west and particularly in the State of Washington and that he

had no knowledge of any such custom. All of the correspondence and telegrams passing between the parties were introduced in evidence.

The plaintiff in error offered to prove that they knew at the time the contract was made that at 21 pounds to the bushel they would have been paying substantially the market price at that time; and at 14 pounds to the bushel they would have been paying two or three cents per pound above the market price. The court sustained an objection to such evidence. (pp. 150-151.)

At the close of the evidence the court upon motion of the defendant in error directed the jury to find a verdict in favor of the defendant in error for the amount sued on and from the entry of such judgment the plaintiff in error has sued out a writ of error to this court upon the following:

ASSIGNMENTS OF ERROR.

I.

The court erred in withdrawing the cause from the jury and directing a verdict in behalf of the plaintiff, because:

(a) Where it becomes necessary to introduce extraneous evidence to ascertain the terms of a contract, it is then a question for a jury as to whether the minds of the contracting parties met—such evidence should go before the jury under proper instructions. In this case the fact that the evidence of custom was admitted is sufficient proof that the contract is ambiguous and extraneous evidence was sought. It is then for the jury to say: 1. If the custom is general or local. 2. If local whether the defendant had knowledge of it. 3. If general whether the presumption that the defendant contracted in reference to it is overcome by other evidence. 4. Whether the custom be local or general it is a question for the jury to say whether the minds of the contracting parties met in conformity with the custom, because parties may contract contrary to the custom.

(b) The letter of the date June 27, 1908, from Brent to Lilly we submit is not a part of the contract.

The most favorable construction that can be placed upon it for the defendant in error is that it is his understanding of the contract. Even, however, if it is a part of the contract, the evidence shows that the letter itself is not plain.

II.

Refusal of court to sustain defendant's challenge to the jurisdiction.

III.

Refusal of the court to grant the defendant a new trial.

IV.

Errors in law occurring at the trial and excepted to at the time.

(a) Admission of evidence concerning custom.

(b) Refusal to admit evidence of the defendant that the contract price on a basis of 14 pounds to the bushel was about 25% higher than the market price at that time; and that the defendant knew that fact and had in his possession at the time he entered into this contract many tenders of the same class of seeds contracted for at a price approximately 25% lower than on a basis of 14 pounds to the bushel. (pp. 150-151.)

ARGUMENT.

Under the first assignment of error the plaintiff in error claims that the court should have submitted the cause to the jury. Under this head we desire to direct the court's attention to the complaint in this action. (p. 3). It pleads a custom among merchants engaged in this business in order to explain the contract. The record shows that the plaintiff in error objected to the introduction of any evidence concerning custom upon the ground that the contract was plain and not ambiguous. (p. 28). The court, however, admitted such evidence over the objection of the plaintiff in error and the evidence of the defendant in error himself, shows that it is, to say the least doubtful, whether such custom prevails west of the Missouri River. (See the deposition of Windheim, pp. 57-111, record.) The plaintiff in error's evidence concerning custom was definite on two points. First: No such custom prevailed in this locality. Second: That he had no knowledge of any such custom. (Record, pp. 123, 131, 148, 156, 197, 141). We submit that under the law, the plaintiff in error would not be bound by the custom unless universal, and since the evidence showed that it was not universal he would

not be bound by local custom unless he had knowledge thereof. The court states it should have gone to the jury if it were a question of custom. (See decision, p. 233).

Usage and custom cannot make a contract:

First Natl. Bank v. Burkhardt, 100 U. S. 686, 25 L. Ed. 766.

Natl. Bank v. Ward, 100 U. S. 95, 25 L. Ed. 621.

Thompson v. Riggs, 72 U. S. (5 Wall. 663), 18 L. Ed. 704.

Evidence of usage and custom may be admitted to explain but not to vary a contract:

Bowling vs. Harrison, 6 Howard 248.

Oelrich vs. Ford, 23 Howard 49.

Bliven vs. Screw Co., 23 Howard 420.

Lamb vs. Klaus, 30 Wis. 94.

Scott vs. Whitney, 41 Wis. 504.

Hinton vs. Coleman, 45 Wis. 165.

Walls vs. Bailey, 49 N. Y. 464.

Allegre vs. Ins. Co., 20 Am. Dec. 424.

Unless custom is universal, knowledge must be brought home to the party to be charged:

Renner vs. Bank, 9 Wheaton 581.

Mills vs. Bank, 11 Wheaton 431.

Bornt vs. Bank, 1 Peters 89.

Irwin vs. Willard, 110 U. S. 499.

Lincoln vs. Fales, 9 Mass. 145.

Jones vs. Fales, 4 Mass. 245.

5 *Rose's Notes,* 23 Howard 420.

Chateaugay Ore Co. vs. Blake, 144 U. S. 476.

Smith vs. Phipps, 32 Atl. 368.

Kelly vs. Kaufmann, 18 S. E. 364.

If evidence of custom is admitted it is then a question for the jury to say whether the minds of the parties met in conformity with such custom; or whether the custom be local or general:

Dickinson vs. Poughkeepsie, 75 N. Y. 65.

Woods vs. Miller, 55 Iowa 168.

Carstens vs. Earles, 26 Wash. 676.

Durand vs. Henry, 33 Wash. 38 and cases cited.

Parsons on Contracts (6th Edition), Vol. 2, page 491.

Richardson vs. Cornforth, 118 Fed 325, 55 C. C. A. 341.

This latter case we submit to the careful consideration of the court, as we believe the facts therein make a stronger case for this defendant in error than the case at bar. Yet the Court of Appeals held that the evidence should have been submitted to the jury.

1st. In that case the parties in *haec verba* agreed that the purchase should be on the usual Chi-

cago basis. That was shown to be 32 pounds to the bushel.

2nd. The defendant acquiesced in 32 pounds to the bushel by paying drafts for each car drawn on that basis.

3rd. There was apparently no conflicting evidence as to what the Chicago custom was.

4th. The plaintiff voluntarily sought the Chicago market for his contract and contracted for purchase upon Chicago basis.

Notwithstanding the fact that the complaint pleads custom in order to explain the contract, the defendant in error took the position at the trial that the letter of June 27th from the defendant in error to the plaintiff in error was a part of the contract and that the correspondence sets forth the number of pounds that should constitute a bushel by the expression "bu (14 #)". In regard to the expression contained in that letter, there was abundance of evidence showing that it was used in the cultural sense, and did not mean the number of pounds to be delivered. That is to say, it meant the amount of seed to be used in sowing. In seeding a certain tract of land the amount of seed to be used depends upon the germinating quality of the seed: the higher the quality of

germination the lesser amount. And to seed 14 pounds to the bushel shows that the seeds are first class and are of a high germinating quality. The correspondence between the parties prior to the shipment shows that such was the quality of the seeds the plaintiff in error was insisting on. The catalogue of the plaintiff in error also shows that such is the sense in which the expression is used. His catalogue showing that for a high germinating quality of seeds 14 pounds is usually sown to the acre. His catalogue shows that he recommends sowing from 12 to 18 pounds of seed per acre according to the germinating quality of the seed. As to the meaning of this expression, we call the court's attention to the following evidence: (Record, pp. 166, 186, 147, 178).

Court decided the case on this point. (p. 235).

"There are several principles of law which, when applied to the facts of this case, require that the plaintiff should have judgment for his claim.

"1. Where there is doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties.

"2. Where the parties to a contract of doubtful meaning have themselves given it a definite construction, this, in the absence of illegality or other contrary circumstances, will be adopted by the courts.

"3. A party who has induced another to act on a certain understanding cannot, after the other party has acted, deny that understanding to the other's loss."

It will thus be seen that the court has overlooked the evidence concerning the meaning of the expression "(bu 14 lbs)." These propositions of law stated by the court seem to be sound and to our mind are three propositions which should have prevented the court from directing a verdict in favor of the defendant in error. So far as the first proposition is concerned, the phrase "which he knew" makes that proposition of law one strongly in aid of the plaintiff in error for this reason: The court will notice that in our requisition (p. 210), we particularly order a quantity of seed, "weighing 21 lbs. to the bushel at $1.40 per bushel." Therefore, when Brent wrote this letter of June 27th he knew what our interpretation of his contract was, and if it was wrong he should have said so, instead of saying that it seemed to be correct, and then putting in a little catch phrase which the evidence shows we use in a particular sense, to-wit: Cultural sense. Right at this point we desire to direct the court's attention to evidence which is applicable at this time, namely: The evidence of Henry Schuett, a witness in behalf of the Brents (Rec., p. 95):

Q. At one time?

A. Yes.

Q. And was that with Brent?

A. I believe so, yes—a number of years ago.

Q. And this same question was made then, and although you specified you should have twenty-one pounds per bushel, you only got fourteen?

A. I think it was nineteen.

Q. Nineteen pounds?

A. *Yes.*

Q. It was specified that you should have nineteen pounds and you only got fourteen?

A. I had a quotation of nineteen pounds of seed per bushel, at such a price, and I bought by that.

Q. And that is the only instance where you have been caught?

A. After that I learned.

Q. What?

A. I learned then after that.

Q. From that time on you knew?

A. Yes.

Q. You knew that when you were buying nineteen or twenty-one pound seed you would get fourteen pounds?

A. Yes.

It is astonishing to us why these merchants will continue using such phrases when they know that they are not understood, at least in the West.

As to the second proposition of law quoted above, we claim that also aids the plaintiff in error, because Lilly in his order in unmistakable language gave Brent knowledge of his interpretation of the contract and at no place did Brent deny the correctness of that interpretation, but upon the contrary said it "seemed to be correct."

As to the third proposition of law, that also should have prevented the court from directing a verdict, because it is unmistakably the fact, whether the evidence shows it or not, and we think the evidence does, that Brent & Co. allowed us to make the purchase and shipped us the seed, knowing from our requisition that our understanding of the contract was that a bushel should constitute 21 lbs. How then shall they be heard to deny that understanding to our loss?

If, however, the facts in this case were different and the plaintiff in error had not given to the defendant in error his interpretation of the contract, the proposition as announced by the court is worthy of some thought. The last four words in the proposition as stated by the court, we think, make it inapplicable even to a case of that kind. The proposition is one way of stating the doctrine of estoppel, and

we doubt if an estoppel can be based upon the fact that a party has done an act which the law would have compelled him to do. However, though in this case the plaintiff in error did give the defendant in error his interpretation of the contract in distinct and unmistakable language, and the defendant in error said it seemed to be correct, and then later on used the expression "(Bu 14 lbs.)," which the evidence shows we also use in a cultural sense. While discussing these propositions of law as announced by the court and upon which he justified his direction of a verdict, I desire to direct the Appellate Court's attention to the meaning and underlying principle in all three of them, to-wit: That one of the parties gave to the other party his understanding of an ambiguous contract. And yet we find the court denying us the right of showing our understanding of the terms used by them.

On page 165 Frank Leckenby, the officer of the plaintiff in error and the man who conducted the negotiations, was asked by us what he understood the expression "(Bu 14 lbs.)" to mean, and the following occurred:

MR. CARR: "I object to that, if the court pleases, as irrelevant and immaterial. It is not for the witness to say what he would understand that letter to mean.

COURT: "Objection sustained. The understanding of this witness did not cut any figure in the case."

Again on page 153, we find the court sustaining another objection or effort to show our understanding of the above expression in the following words:

"Of course this objection must be sustained. The understanding of the parties to a written contract is never material, except as gathered from the instrument itself."

On page 237 the court explains his meaning by saying, "It is not competent for a party to testify as to what intention existed in his mind, when he used in communicating that state of mind to the other party." Now, applying that principle to this case: how can the directed verdict be upheld? We received the quotation on a basis of 21 pounds to the bushel. We know of no particular meaning that such quotation had in the mind of the defendant in error; we accepted the offer and in plain and undisputed English made a statement susceptible of but one construction, to-wit, "weighing 21 pounds to the bushel at $1.40 per bushel." The other party who knew that his quotations were often misunderstood, after receiving that notification from us, said it "seemed to be correct," and then used an expression later on in his letter which we always use in an entirely differ-

ent meaning. We certainly think that the principles of law announced by the court should have prevented a directed verdict, even if they did not warrant the court in directing a verdict in our behalf.

Under the second assignment of error we bring to the court's attention the question as to whether or not the Federal Court can take jurisdiction of an action brought by the plaintiff for the sum of $2,000.00 and has tendered plaintiff that sum. The $3,024.00, when the defendant has admitted to the plaintiff that he was obligated in the matter sued on to the extent of some $2,000.00 and has tendered plaintiff that sum. The pleadings show that the plaintiff knew at the time he brought the action that the only amount in controversy between him and the defendant was the difference between $3,024.00 and the sum of $2,016.00 admitted by the plaintiff in error to be due and which had been tendered the defendant prior to the institution of the action. We consider that the "amount in controversy" between the two parties is the difference between what one claims and the other admits.

Under the third assignment of error we claim that the trial court erred in refusing to grant the plaintiff in error a new trial. The reasons urged for

a new trial are those embraced in the other assignments of error and need not be separately discussed under this head.

Under the fourth assignment of error, to-wit: errors of law occurring at the trial and excepted to at the time, we eliminate minor rulings and direct the court's attention to two which we consider prejudicial to the rights of the plaintiff in error.

1. Admission of evidence concerning custom.

2. The refusing to admit evidence of the plaintiff in error that the contract price on a basis of 14 pounds to the bushel was about 25 per cent. higher than the market price at that time, and that the plaintiff in error knew that fact and had in his possession at the time he entered into the contract many tenders of the same class of seed contracted for at a price approximately 25 per cent. lower than on a basis of 14 pounds to the bushel.

We think it plain that the court either erred in admitting evidence of custom, or if correct in admitting evidence of custom, then he erred in taking the case from the jury. If a contract is not ambiguous, then no evidence of custom should be admitted, because the parties may contract irrespective of a cus-

tom and in fact may, and often do, contract contrary to certain customary proceedings.

In admitting the evidence of custom the court held that the contract was ambiguous, necessarily so. After hearing the evidence of custom, he then held that the contract was no longer ambiguous but was definite and certain, and that the minds met on the basis of 14 pounds. The two positions seem to us untenable.

Under the last subdivision of the fourth assignment of error, it seems to us that the court unquestionably erred. He says in his decision denying the petition for a new trial that this matter should have been pleaded. Our view of the matter is, that it was admissible without being pleaded. Its materiality, of course, is self-evident. The defendant in error claims that the minds of the contracting parties met on a basis of 14 pounds to the bushel because it was customary among this class of merchants to consider 14 pounds as a bushel. Therefore, they were letting the custom control them in this matter. Now the evidence offered by the plaintiff in error and which the court refused is based upon a custom. This custom is even stronger than the one sued one, because it has its foundation in the first law of nature, to-wit: that of self-preservation. Therefore, we find it an-

nounced as a principle of law that people are presumed to take advantage of beneficial contracts and opportunities. That was the point to this evidence. The position of the defendant in error was this, "You contracted for 14 pounds to a bushel because it is customary among us to consider 14 pounds to a bushel." The plaintiff in error answers: "No, I did not do that, because I knew nothing about such custom, but even had I known about that custom, I understood your offer to be 21 pounds to the bushel. Had I understood it to be 14 pounds to the bushel I would not have accepted it, because that would have been two to three cents per pound, that is 25 per cent., higher than what I could have gotten the same article elsewhere." In other words, custom is placed against custom. And the evidence rejected was based upon a custom stronger and more controlling than the custom sued on. Now, how could it have been pleaded? For instance, if a man sued on a *quantum meruit* for services performed, cannot the defendant under a denial prove that he could have secured the same service in the open market at a lower figure? It seems to us so self-evident that he could that we shall not discuss the question other than to say that had we plead it, the answer would have been something like this:

1. A general denial.

2. "We did not agree to buy at 14 pounds to the bushel because we could have gotten the same goods elsewhere for 25 per cent. less."

Now it goes without saying that counsel would have moved against such a plea. It is merely evidenciary. It is merely a bit of evidence supporting the plea contained in the general denial. It is a reason why we did not contract on a basis of 14 pounds to the bushel. The reason why a man is not guilty does not have to be set forth in the pleading—it is evidence under the denial.

We submit that the cause should be reversed and a new trial ordered and the matter submitted to a jury as to whether or not the minds of the contracting parties met on the point as to what should constitute a bushel. If they did not meet, then the defendant in error should recover upon a *quantum meruit*.

Respectfully submitted,

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